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**Criminal Law
and
HIV/AIDS**

Canadian Criminal Cases and HIV

There have been at least 24 cases to date in Canada in which criminal charges have been laid against an HIV-positive person for transmitting HIV or exposing another person to the risk of infection. This info sheet provides a brief summary of these cases.

This is one of a series of eight info sheets on
Criminal Law and HIV/AIDS.

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R v Thornton¹

An HIV-positive man was convicted of *common nuisance* for donating blood. He testified that he hoped that removing some of his contaminated blood would reduce the likelihood of developing AIDS, and he believed that his infected blood would be detected by the Red Cross screening system. The court concluded he had endangered the health of “the public,” and convicted, with a sentence of 15 months’ imprisonment. Both the Ontario Court of Appeal and the Supreme Court of Canada upheld the conviction.

R v Wentzell²

The accused had unprotected sex on roughly 40 occasions with one woman without disclosing his HIV infection. She was later diagnosed HIV-positive. Wentzell pleaded guilty to *criminal negligence causing bodily harm*. The court agreed he had shown “wanton and reckless disregard” for the complainant’s life, and sentenced him to three years in prison.

R v Lee³

Lee had tested HIV-negative previously but suspected he might be infected. In 1990, he had unprotected sex with a woman who was aware of his history of having sex and sharing needles with a mutual friend, a gay injection drug user. The woman continued to test HIV-negative over a year after having had sex with him. Lee was charged with *aggravated assault* for having engaged in unprotected sex without telling the complainant he was HIV-positive. The court acquitted Lee, noting that he only suspected that he might be HIV-infected and that, despite Lee’s failure to disclose his HIV infection, the complainant had given legally valid consent to the sexual activity.

R v Summer⁴

Over the course of two years, Summer had unprotected sex with several partners without disclosing his HIV infection. He pleaded guilty to a charge of *common nuisance* for having “endangered the lives and health of the public,” and was sentenced to one year in prison and three years’ probation. His appeal of the sentence was dismissed.

Anonymous woman in BC

In December 1991, an HIV-positive woman was charged with two counts of aggravated sexual assault after allegedly having unprotected sex with two men. This is the only case to date in Canada where charges have been laid against an HIV-positive woman for having unprotected sex. The outcome of the case is unknown.

R v Mercer⁵

Mercer had unprotected sex with two women without disclosing his HIV infection. Both women later tested HIV-positive. He pleaded guilty to two charges of *criminal negligence causing bodily harm* and was sentenced to 27 months' imprisonment. The Newfoundland Court of Appeal increased the sentence to 11 years' imprisonment. The Supreme Court of Canada refused leave to appeal.

R v Kreider⁶

The accused had unprotected sex with his partner on three occasions before disclosing his HIV-positive status. She continued to test HIV-negative and subsequently had protected sex with him. He pleaded guilty to *common nuisance* and was sentenced to one year in prison.

R v Ssenyonga⁷

The accused had unprotected sex with several women without disclosing his HIV infection. He was charged with four different offences with respect to each of three women who later tested HIV-positive. The charges of *common nuisance* were dismissed on the ground that having sex with specific individuals did not endanger the safety or health of "the public." Charges of *administering a noxious thing* were dismissed because of insufficient evidence that he could have foreseen the "substantial certainty" of transmitting HIV by having unprotected sex. The judge acquitted Ssenyonga on the charges of *aggravated sexual assault*, finding the complainants had given legally valid consent to the sexual activity in question, even though he had not disclosed his HIV-positive status. Only the charges of *criminal negligence causing bodily harm* remained outstanding. Ssenyonga died before the trial judge could deliver his judgment; no verdict was rendered.

R v Lesieur⁸

The accused, an HIV-positive inmate, assaulted prison guards trying to restrain him, smearing his blood on cuts on one guard's arm and biting another guard, while stating he would infect them with HIV. He was acquitted on the charge of *attempted murder*, but convicted on other charges of assault and uttering threats, and sentenced to four years' imprisonment.

R v McKenzie⁹

An HIV-positive man was charged with attempted murder for deliberately cutting his finger before engaging in a fistfight outside a bar. Medical testimony estimated the risk of HIV transmission to the other combatant to be 0.3% at most. He was convicted and sentenced to three years in prison.

R v Michel¹⁰

The accused was charged with *aggravated sexual assault* for allegedly having sexually assaulted a woman while knowing he was HIV-positive. He was convicted of simple sexual assault and sentenced to five years' imprisonment.

R v Taylor¹¹

An HIV-positive man was charged with *attempted murder* and *aggravated assault* for biting a police officer following his arrest for drunk driving. He was acquitted on the attempted murder charge, as the Crown could not prove any intent to kill beyond a reasonable doubt. However, he was convicted on the assault charge and sentenced to 10 months in prison.

R v Trudeau¹²

An HIV-positive woman was charged with *uttering death threats* and *aggravated assault* after stabbing another woman with a syringe possibly containing HIV-contaminated fluid, after the latter refused to supply her with drugs. Upon pleading guilty, she was sentenced to 30 months' imprisonment.

R v Tremblay¹³

An HIV-positive man smeared his blood on a teenage girl's cuts and told her she would die. She was not infected. He was convicted of assault causing bodily harm, but as there was no medical evidence proving that HIV could be transmitted

by smearing blood, he was acquitted on charges of *attempted murder* and *uttering death threats*.

R v Napora¹⁴

The accused had unprotected anal sex with two other men without disclosing his HIV-positive status. He was acquitted on two counts of *common nuisance*, since the evidence established that his partner could have already been infected. The trial judge noted that “the criminalization of consensual, but unprotected, high risk sexual activity may well have a negative effect on the HIV testing program.”

R v Tan¹⁵

Tan was charged with *aggravated assault* and *administering a noxious thing* for allegedly deliberately injecting her lover with HIV-contaminated blood. She was acquitted because there was insufficient evidence to show either that she had injected him at all, or that her conduct had been the source of the complainant’s HIV infection, given his past sexual and injection drug use practices.

R v Winn¹⁶

An HIV-positive man was convicted of *aggravated assault* for having endangered the life of his victim in the course of the assault, which included beatings and ejaculation in her mouth, vagina, and onto an open facial wound caused by him. His HIV infection was treated as a factor aggravating the seriousness of the assault. He was sentenced to 12 years’ imprisonment; this was upheld on appeal.

R v Bonar¹⁷

An HIV-positive man died in 1996 before his trial on charges of *aggravated assault* and *criminal negligence causing bodily harm* for “knowingly infecting a woman with HIV.”

R v Thissen¹⁸

An HIV-positive transgendered sex worker was charged with *aggravated assault* for biting an undercover police officer during a scuffle when he tried to arrest her, allegedly for propositioning him on the street. She pleaded guilty to the charge, meaning the Crown was not required to prove that her bite to the officer’s hand could “endanger [his] life.” She was sentenced to two years

less a day in prison. A term of her additional three-year probation was a prohibition on engaging in unprotected sex (even after disclosing her HIV-positive status to a partner). The sentence was upheld on appeal.

Anonymous Montréal man

A gay man was charged with *common nuisance*, *criminal negligence causing bodily harm*, *aggravated assault*, and *sexual assault* after his ex-partner complained to police that he had contracted HIV through unprotected sex with the accused. The complainant alleged that his accused ex-partner had not disclosed his HIV status. The accused pleaded not guilty in May 1996, and was reported as being close to death.

Anonymous man in Gatineau¹⁹

A newspaper reported that an HIV-positive man was charged in November 1997 with *criminal negligence* and *aggravated sexual assault* for allegedly having had unprotected sexual intercourse with his partner between 1993 and 1997, without disclosing his status.

R v Mitchell²⁰

An Ontario trial court ruled that an HIV-positive woman had committed *aggravated assault* for biting a police officer (drawing blood), thereby “endangering her life.” The court also found the accused not criminally responsible on account of mental disorder, but because the accused posed “a significant threat to the safety of the public,” ordered that she be detained in a mental health facility. This order is subject to future review.

R v Cuerrier²¹

The accused was charged with two counts of *aggravated assault* for having unprotected sex with two women without disclosing his HIV infection. He was acquitted on both counts in January 1995 (on a motion for a directed verdict of acquittal). The BC Court of Appeal upheld this decision, agreeing that the two complainants had given valid consent to the sexual activity. The Crown appealed further. In September 1998 the Supreme Court of Canada, in the first case considering criminal liability for exposing another to the risk of HIV infection to reach the country’s highest court, ruled that it *could* be an assault under Canadian law to engage in sex without disclosing HIV

infection if this created a “significant risk of serious bodily harm,” and ordered a new trial. The Court *may* have left open for decision in future cases the possibility that taking precautions (eg, safer sex) might reduce the risk of harm enough so that there would not be a duty to disclose HIV infection to a partner. However, this is not clear. Future court cases may answer this question.

R v Hollihan²²

At a preliminary inquiry, a Newfoundland provincial court ruled that a man accused of having unprotected sex with a woman without disclosing his HIV-positive status would stand trial on the charge of *common nuisance*. In the *Ssenyonga* case (see above), an Ontario court ruled that the health of “the public” was not endangered by an HIV-positive man who had unprotected sex with three specific women. The Newfoundland court rejected this conclusion, saying that “specific individuals are members of the public and it matters not whether deliberate unprotected sex is had with one, one thousand, or one million members.”

¹ [1989 OJ No 1814 (Dist Ct) (QL), aff'd (1991), 3 CR (4th) 381, 1 OR (3d) 480 (CA), aff'd [1993] 2 SCR 445, 82 CCC (3d) 530, 21 CR (4th) 215.

² Unreported, 8 December 1989, NS County Court, file no CR-10888.

³ (1991), 3 OR (3d) 726 (Gen Div).

⁴ [1989] AJ No 784 (Prov Ct) (QL), aff'd 73 CR (3d) 32 (Alta CA).

⁵ (1993), 84 CCC (3d) 41, 110 Nfld & PEIR 41 (CA), leave to appeal to SCC refused, SCC Bull, 4 March 1994, at 348.

⁶ (1993), 140 AR 81 (Prov Ct), [1993] AJ No 422 (QL).

⁷ [1991] OJ No 544 (Gen Div) (QL) (application for restraining order under HPPA); [1991] OJ No 1460 (Gen Div) (QL) (bail review hearing); (1992), 73 CCC (3d) 216 (Ont Ct Prov Div) (preliminary hearing dismissing common nuisance and administering noxious thing charges); (1993), 81 CCC (3d) 257 (Ont Ct Gen Div) (directed verdict acquitting on assault charges); [1993] OJ No 3273 (Gen Div) (QL) (decision to not deliver judgment on criminal negligence charges).

⁸ Unreported, 1993, Québec Superior Court, District of Québec, file no 200-01-008541.

⁹ Unreported, 31 March 1993, Court of Québec (Trois-Rivières), Morand J; see: Trois ans de prison pour tentative de meurtre par transmission du sida. *La Presse*, 1 April 1993, at A15.

¹⁰ Unreported, trial conducted October 1994, BC Supreme Court; see [1996] BCJ No 1970 (CA) (QL); [1996] BCJ No 3024 (CA) (QL).

¹¹ Unreported, 28 January 1994, Court of Québec (Joliette), Héту J, File no 705-01-3385-1939; see B Guillot-Hurtubise. Ten Months' Imprisonment for Biting Police Officer. *Canadian HIV/AIDS Policy & Law Newsletter* 1994; 1(1): 6.

¹² Unreported, 26 April 1994, Court of Québec (Montréal), Bonin J, File no 500-01-475-944; see B Guillot-Hurtubise. 30 Months' Imprisonment for Syringe Attack. *Canadian HIV/AIDS Policy & Law Newsletter* 1994; 1(1): 6.

¹³ Unreported, 20 February 1994, Court of Québec (Montréal), Cadieux J, File no 500-01-017674-935; see R. Jürgens. HIV-Positive Man Acquitted of Attempted Murder Charge for Smearing Blood on Victim. *Canadian HIV/AIDS Policy & Law Newsletter* 1995; 1(3): 8-9.

¹⁴ Unreported decision, 24 February 1995 (Alta QB, Edmonton) (motion for directed verdict of acquittal); unreported decision, 27 November 1994 (not guilty verdict).

¹⁵ Unreported, 23 May 1995, Alta QB, Edmonton, Ritter J.

¹⁶ (1998), 38 OR (3d) 159 (CA), aff'd (1995), 25 OR (3d) 750, 43 CR (4th) 71.

¹⁷ Unreported; see *BCPWA News*, September/October 1998, at 12.

¹⁸ 31 WCB (2d) 176 (Ont Ct Prov Div), aff'd [1998] OJ No 1982 (CA) (QL).

¹⁹ Unreported; see: Un sidéen trop discret a été accusé de négligence criminelle. *Le Journal de Montréal*, 30 November 1997, at 19; HIV-Positive Man Faces Criminal Charges. *Canadian HIV/AIDS Legal Network* 1997/98; 3(4)/4(1): 46.

²⁰ [1998] OJ No 713 (Prov Div) (guilty verdict); [1998] OJ No 715 (Prov Div) (disposition hearing).

²¹ (1998), 127 CCC (3d) 1 (SCC), rev'g 91996), 111 CCC (3d) 261 (BCCA), aff'g 26 WCB (2d) 378 (BCSC).

²² [1998] NJ No 176 (Nfld Prov Ct) (QL).

For more information, see R Elliott. *Criminal Law and HIV/AIDS: Final Report*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997. Copies of the report and the info sheets are available on the Network website at www.aidslaw.ca or through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca). Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information. For further information, contact the Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca). **The Legal Network cannot provide legal advice. Ce feuillet d'information est également disponible en français.**

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